

# Washington University Law Review

---

Volume 95 | Issue 6

---

2018

## Public Unions Under First Amendment Fire

Tabatha Abu El-Haj

*Drexel University, Thomas R. Kline School of Law*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_lawreview](https://openscholarship.wustl.edu/law_lawreview)



Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), [Labor and Employment Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Tabatha Abu El-Haj, *Public Unions Under First Amendment Fire*, 95 WASH. U. L. REV. 1291 (2018).  
Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol95/iss6/5](https://openscholarship.wustl.edu/law_lawreview/vol95/iss6/5)

This Symposium is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

# Washington University Law Review

---

VOLUME 95

NUMBER 6

2018

---

## PUBLIC UNIONS UNDER FIRST AMENDMENT FIRE

TABATHA ABU EL-HAJ\*

### ABSTRACT

*Unions today are under First Amendment fire, with the compelled speech doctrine as the weapon of choice. Conservative interests are waging a legal war against agreements that include “fair-share service fees,” under which public-sector unions are permitted to charge nonunion members to pay their share of the costs of collective bargaining. Espousing libertarian theories of free speech doctrine, an array of conservative-funded litigants maintain that fair-share service fees, at least in the context of public-sector unions, constitute a form of political speech, and that laws mandating their payment by nonunion members violate the First Amendment’s prohibition against compelled speech. The Supreme Court is poised to accept this position, having granted certiorari in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, a case that threatens to overrule the Court’s longstanding acceptance of the constitutionality of fair-share service fees.*

*Notwithstanding the superficial appeal of the compelled speech argument, this Article argues that pro-union interests have plenty of cover within the First Amendment’s freedom of association doctrine. Viewing *Janus* and its ilk through an associational lens demonstrates the fallacies that lie behind doubts concerning the constitutionality of such agreements.*

---

\* Associate Professor of Law, Drexel University, Thomas R. Kline School of Law. First and foremost, I would like to thank the students on the law review for inviting me to participate in this symposium in honor of Gregory Magarian and his wonderful book. In addition to Professor Magarian, I wish to extended thanks to the other participants at the symposium as well as Cassie Ehrenberg, Alexander Hertel-Fernandez, and John M. West. Special thanks is also due to Kaitlin O’Donnell, Sydney Mellilo, and John Cannan for their invaluable research assistance.

*Although it is doubtful that the Supreme Court will reaffirm the constitutionality of fair-share service fees this term, it is important to air such arguments in order to head off potentially even more significant First Amendment attacks on unionism that are currently underway and to articulate a theory of the First Amendment that remains consistent with the basic New Deal compromise that leaves matters regarding labor policy to our legislatures, where they belong.*

### INTRODUCTION

Unions, once a pillar of modern civil society, are under attack in both legislatures and courts. For several years now, conservative interests have been on a renewed mission to undermine the ability of workers (particularly public-sector workers) to unionize, largely in recognition of the effectiveness of unions in politics.<sup>1</sup>

Legislative efforts, funded by the Koch network and facilitated by the American Legislative Exchange Council (ALEC), have resulted in a variety of statutes seeking to curtail the economic and political power of unions, occasionally even in states where public support for unions is high.<sup>2</sup> The

---

1. See generally Alexander Hertel-Fernandez, *New Conservative Strategies to Weaken America's Public Sector Unions*, SCHOLARS STRATEGY NETWORK (Oct. 2015), [www.scholarsstrategynetwork.org/brief/new-conservative-strategies-weaken-americas-public-sector-unions](http://www.scholarsstrategynetwork.org/brief/new-conservative-strategies-weaken-americas-public-sector-unions) [https://perma.cc/UEY5-JQAX] (arguing that the strategic decision to target public-sector unions is driven by their perceived political effectiveness).

2. Theda Skocpol & Alexander Hertel-Fernandez, *The Koch Network and Republican Party Extremism*, 14 PERSP. ON POL. 681, 693–94 (2016) (noting that Americans for Prosperity was able to effect its goal of curtailing unions' bargaining rights in states, like Michigan and Tennessee, where public support for public-sector unions was high, as well as in states where levels of public support were significantly lower). States have recently adopted legislation that precludes their workers from bargaining for agreements in which nonunion employees must pay for the union's representation in collective bargaining—typically exempting firefighters and state and local police officers. See, e.g., MICH. COMP. LAWS §§ 423.210(3)–(4) (2018) (providing that “an individual shall not be required as a condition of obtaining or continuing public employment to . . . [p]ay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative” but exempting police, firefighters, and state troopers from the provision). States have also adopted a series of so-called “paycheck protection” reforms. Such efforts restrict the use of automatic payroll deductions on behalf of public-sector unions either by prohibiting the use of payroll deduction programs for political contributions, such as political action committees (PACs), or by barring public-sector employers from collecting union dues via automatic payroll deductions—once again, typically carving out an exception for public safety unions. See, e.g., *Ysursa v. Pocatelto Educ. Ass'n*, 555 U.S. 353, 364 (2009) (upholding Idaho law prohibiting public-sector unions from using payroll deductions to collect political contributions); *Mich. State AFL–CIO v. Schuette*, 847 F.3d 800, 801–03 (6th Cir. 2017) (upholding a statute that penalized unions, but not corporate employers, for using payroll deductions to collect voluntary PAC contributions); *Ala. Educ. Ass'n v. State Superintendent of Educ.*, 746 F.3d 1135, 1139 (11th Cir. 2014) (same); *Bailey v. Callaghan*, 715 F.3d 956, 958 (6th Cir. 2013) (upholding the constitutionality of a statute that singled out unions representing public school employees and prohibited them from collecting union dues through payroll deductions). See generally Noam Scheiber & Kenneth P. Vogel, *Behind a Key Anti-Labor Case, a Web of Conservative Donors*,

Wisconsin Budget Repair Bill of 2011, which significantly restricted the collective bargaining rights of the state's "general employees," was atypical only insofar as it prompted massive public protests against Governor Scott Walker for his role in backing it.<sup>3</sup> Collectively, these efforts comprise the newest iteration of an impassioned debate about the value of unionism, a debate that has been ongoing since the adoption of the National Labor Relations Act in 1935.<sup>4</sup>

Not satisfied with these legislative wins, conservative interests are now seeking to constitutionalize their gains. State laws allowing public-sector unions to bargain for contracts that permit nonunion employees to be charged what are known as "fair-share service fees" have come under particular First Amendment fire.<sup>5</sup> While such laws do not permit collective bargaining agreements that mandate union membership as a condition of employment, they do authorize unions to bargain for contracts in which those employees who opt out of union membership must still contribute to the costs of the union's employment-related representation, including its collective bargaining.<sup>6</sup> These charges arise because states, including California and Illinois, require unions to represent members and nonmembers equally and fairly as a condition of the right to be an exclusive representative of the unit.<sup>7</sup> From the union's perspective, these agreements, known as "agency shops," are justifiable on the grounds that nonunion employees should not be permitted to free ride on the union's statutorily mandated, employment-related bargaining, which benefits both union and nonunion employees alike.

---

N.Y. TIMES (Feb. 25, 2018), <https://www.nytimes.com/2018/02/25/business/economy/labor-court-conservatives.html>.

3. Wis. Educ. Ass'n Council v. Walker, 705 F.3d 640, 642–44 (7th Cir. 2013) (upholding the Wisconsin law in a challenge brought by seven of the largest unions in Wisconsin).

4. See, e.g., Am. Fed'n of Labor v. Am. Sash & Door Co., 335 U.S. 538, 546–53 (1949) (Frankfurter, J., concurring) (noting vociferous political debate about unionism, including closed shops and union security agreements, is accommodated by the fact that "[w]hat one State can refuse to do, another can undo"). See generally SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 56–78 (2014).

5. See, e.g., Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 851 F.3d 746 (7th Cir. 2017), cert. granted, 138 S. Ct. 54 (U.S. Sept. 28, 2017) (No. 16-1466); Friedrichs v. Cal. Teachers Ass'n, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), aff'd per curiam, 136 S. Ct. 1083 (2016) (mem.) (affirmed by default pursuant to a four-four split).

6. These challenges do not implicate the National Labor Relations Act, which expressly excludes public employees from its scope. 29 U.S.C. § 152(2) (2012) (expressly excluding state and political subdivisions from its definition of "employer"). The National Right to Work Legal Defense Foundation identifies twenty-seven states as so-called right-to-work states. See *Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., <http://www.nrtw.org/right-to-work-states> (last visited Mar. 6, 2018). These states differ significantly in their protections for dissenting employees.

7. See, e.g., CAL. GOV. CODE § 3502.5 (2018); 5 ILL. COMP. STAT. 315/6(d) (2018).

While the constitutionality of fair-share service fees has long been settled,<sup>8</sup> conservative litigants, emboldened by a series of Roberts Court opinions espousing libertarian theories of free speech doctrine,<sup>9</sup> contend that requiring nonunion employees in the public sector to pay their portion of the cost of a union's employment-related representation constitutes compelled speech in violation of the First Amendment.<sup>10</sup> This term, the conservatives are poised to succeed. In granting certiorari in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, a case initially brought by the Governor of Illinois, but now being litigated by three state employees, the Supreme Court has taken up the invitation to strike down agency-shop arrangements.<sup>11</sup>

Notwithstanding the superficial appeal of the compelled speech argument, this Article argues that existing freedom of association doctrine provides plenty of cover for the unions. Neither First Amendment doctrine nor principle dictates a finding that agency-shop arrangements are unconstitutional for public-sector workers—and this is not simply because the Supreme Court upheld these arrangements forty years ago in *Abood v. Detroit Board of Education*.<sup>12</sup>

Indeed, viewing *Janus* and its ilk through an associational lens brings into sharp relief the fallacies that lie behind doubts concerning the constitutionality of fair-share service fees. The associational angle remains important regardless of the outcome in *Janus*, because a favorable ruling for the petitioner in *Janus* is just the beginning.<sup>13</sup> A second thread of anti-union litigation, in the lower courts, has set its sights on reversing the constitutionality of state-sanctioned exclusive bargaining units.<sup>14</sup>

---

8. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

9. *See Harris v. Quinn*, 134 S.Ct. 2618, 2627–34 (2014); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 322 (2012).

10. *See, e.g., Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 863 (7th Cir. 2017); *D'Agostino v. Baker*, 812 F.3d 240, 243 (1st Cir. 2016) (Souter, J.); *see also Master Builders of Iowa, Inc. v. Polk Cty.*, 653 N.W.2d 382, 398–99 (Iowa 2002).

11. 851 F.3d 746 (7th Cir. 2016), *cert. granted*, 138 S.Ct. 54 (U.S. Sept. 28, 2017) (No. 16-1466).

12. *Abood*, 431 U.S. at 231, 234–36.

13. The Roberts Court's First Amendment decisions in relationship to public-sector unions have created a rich academic literature. Few scholars, however, focus on freedom of association doctrine, and those who have generally emphasize the associational rights of the unions themselves as expressive associations. *See Catherine L. Fisk & Margaux Poueymirou, Harris v. Quinn and the Contradictions of Compelled Speech*, 48 LOY. L.A. L. REV. 439, 471–72 (2014); Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1027 (2013). Brishen Rogers has gone the furthest in considering the implications of freedom of association doctrine for fair-share service fees, but he too fails to distinguish between the expressive and non-expressive components of the doctrine. *See Brishen Rogers, Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1630 (2016). Meanwhile, other pro-union scholars have sought to develop union financing structures that might alleviate the burden that agency-shop arrangements allegedly place on First Amendment rights. *See Aaron Tang, Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144, 150 (2016).

14. *See, e.g., Hill*, 850 F.3d at 863; *D'Agostino*, 812 F.3d at 243.

It therefore remains critical to elucidate the ways in which both existing freedom of association doctrine and fundamental First Amendment principles support the constitutionality of state-sanctioned exclusive bargaining units. Doing so, moreover, offers a much-needed opportunity to push back on both the libertarian<sup>15</sup> and managerial tendencies of the Roberts Court<sup>16</sup> while drawing out two friendly amendments to Professor Magarian's provocative account of dynamic diversity.<sup>17</sup> The first is a nudge to recognize the mechanics of politics. The second, and possibly more fundamental, is a caution to remember that the First Amendment is not an end in itself.

Certainly, as Professor Magarian eloquently explains "self-government requires [a] constant debate"—one which is boisterous and inclusive of a broad array of citizens.<sup>18</sup> A functioning democracy, however, requires more than boisterous discourse. It also requires a plurality of representative and participatory organizations capable of translating that discourse into the rough-and-tumble of politics in which the ultimate goal is political responsiveness from our policymaking bodies.

The freedom of speech and the freedom of association, moreover, are protected to ensure such politics—to ensure, that is, "that the political process by which those legislative judgments are made is an open one."<sup>19</sup> In other words, they do not function to take certain issues or modes of regulation off the legislative agenda (e.g., speech regulation)—unlike the Reconstruction Amendments. Instead, they seek to ensure the conditions necessary such that the full range of policy possibilities are capable of making it onto the legislative agenda, where there is sufficient support.

Ultimately, these two friendly amendments, like the arguments made below, are driven by the central commitment of our liberal democracy—namely, that fundamental and fraught political debates (including those about the merits of unionism) should be left to the political process in Congress and in the states—where they belong. Unions may or may not be a good thing. Conservatives view public-sector unions as self-serving and rent-seeking. Progressives see them as the last bastion of middle-class

---

15. See generally Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1231–32 (2014); Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1624 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016).

16. GREGORY P. MAGARIAN, *MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT DOCTRINE* 228–35 (2017).

17. *Id.* at 239–53.

18. *Id.* at xi.

19. Tabatha Abu El-Haj, "Live Free or Die"—*Liberty and the First Amendment*, 78 OHIO ST. L.J. 917, 921 (2017) ("Abu El-Haj, 'Live Free or Die'").

power. The First Amendment's function, however, is not to end political debate.

To the degree that a ruling in favor of the petitioner in *Janus* seeks to put an end to political debate about labor policies by constitutionalizing the viewpoint of right-to-work advocates, it is clearly in error. None of the state practices supporting unionism that have been challenged on First Amendment grounds threaten the ability of right-to-work advocates to get a fair shake in the political process. Indeed, recent right-to-work legislative successes are *prima facie* evidence vindicating not only our democratic process but also the value of federalism as a mechanism for accommodating diverse preferences.<sup>20</sup> The First Amendment requires that pro-union forces be afforded the same political opportunities.

#### I. FIRST AMENDMENT COVER AND THE FREEDOM OF ASSOCIATION

##### A. *The Constitutionality of Fair-Share Service Fees*

Existing First Amendment doctrine does not require a finding that agency-shop arrangements in the public-sector are unconstitutional. Indeed, existing freedom of association doctrine effectively precludes a win for these plaintiffs, revealing the fallacies of the alleged compelled speech argument that has been offered. The First Amendment objections to fair-share service fees are predicated on a bait-and-switch (speech for association)—one that is facilitated by a jurisprudence that is insufficiently attentive to the differences between these two cognate First Amendment rights.<sup>21</sup>

Contemporary challenges to fair-share services fees, like the challenge at issue in *Abood*—the precedent that conservatives seek to overturn—are, at bottom, claims of alleged compelled association. Despite efforts to distract the Court with a variety of references to the compelled speech doctrine, nonunion members' primary objection to the agency shops has always been that it constitutes an "impingement upon [their] associational freedom" to refuse to associate with the union.<sup>22</sup> In *Janus*, for instances, the

---

20. See generally Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987).

21. See generally Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53 (2014) ("Abu El-Haj, *Friends, Associates, and Associations*"); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011).

22. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225 (1977); see also Appellants' Brief and Short Appendix at 8–11, *Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, Council 31, 851 F.3d 746 (7th Cir. 2016), *cert. granted*, 138 S. Ct. 54 (U.S. Sept. 28, 2017) (No. 16-1466) (collapsing arguments with respect to speech and association).

petitioner criticizes *Abood* for failing to notice that “[f]orced association must serve a compelling state interest.”<sup>23</sup>

Once the associational claim is placed front and center, the mirage that agency-shop arrangements constitute compelled speech vanishes—even under existing First Amendment doctrine. *Abood* prohibits agreements that compel nonmembers to cover political and ideological projects but permits unions to charge nonmember employees fees for services related to collective bargaining over terms and conditions of employment and similar employment-related advocacy.<sup>24</sup> The former infringe on an individual’s freedom of speech; the latter, by contrast, are not constitutionally suspect.<sup>25</sup>

*Abood* creates a distinction, for First Amendment purposes, between unions as *associations of employees* (engaged in employment-related advocacy) and unions as *civic associations* (engaged in political advocacy).<sup>26</sup> This distinction parallels the central distinction within existing freedom of association doctrine between expressive and nonexpressive associations—a doctrinal fact *Abood*’s critics seek to elide.<sup>27</sup>

Not all forms of association are constitutionally protected under established freedom of association doctrine. Instead, meaningful constitutional protection only attaches to expressive associations.<sup>28</sup> Economic associations acting in economic capacities have not been recognized as expressive associations.<sup>29</sup> The well-established lack of First Amendment protection for economic association was recently reaffirmed in a challenge brought against Seattle’s minimum wage laws. The petitioner—an organization of various franchisors—argued that the ordinance violated its First Amendment rights insofar as “two of the three definitional criteria

---

23. See Appellants’ Brief and Short Appendix at 6, *Janus*, 851 F.3d 746 (No. 16-3638).

24. *Abood*, 431 U.S. at 235–36; accord *Keller v. State Bar of Cal.*, 496 U.S. 1, 5, 13–14 (1990) (upholding state professional bar association’s right to “fund activities germane to [its statutory] goals out of the mandatory dues of all members,” but clarifying that the use of such mandatory dues to fund unrelated “activities of an ideological nature” is constitutionally prohibited when the member objects).

25. *Abood*, 431 U.S. at 235–36.

26. Dualities in the nature of unions are recognized in other areas of labor law. For example, the law often distinguishes between situations in which the union operates as a state actors and those in which it acts as a private association. Cf. *Bain v. Cal. Teachers Ass’n*, No. 2:15-cv-02465-SVW-AJW, 2016 WL 6804921, at \*6–8 (C.D. Cal. 2016) (rejecting First Amendment challenge brought by union member arguing that the unique benefits of union membership—in particular, voting rights to approve collective bargaining agreements and access to disability and life insurance—effectively coerce individuals to join the union on the grounds that a union acts as a private actor when it establishes terms of membership).

27. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O’Connor, J., concurring) (noting that “there is only minimal constitutional protection of the freedom of commercial association”).

28. *Id.* at 618 (defining expressive associations as those in which individuals “associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion”). Intimate association is also protected, but largely under principles associated with substantive due process. *Id.* at 618–620.

29. See *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337, 357 (Wis. 2014).



for franchises are based on speech and association—operating under a marketing plan prescribed by a franchisor and associating with a trademark or other commercial symbol.”<sup>30</sup> The Ninth Circuit quickly dismissed the argument as “unpersuasive,” stating: “[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. . . . [T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.”<sup>31</sup>

Thus, even if we concede for purposes of argument that an agency shop constitutes compelled association, the union, in its collective bargaining capacity, is not the sort of association that lies within constitutional purview. Corporations, for instance, have robust speech rights, but they are not afforded protection under current freedom of association doctrine.<sup>32</sup> Were it otherwise, corporations and unions would be constitutionally entitled to restrict employment and membership on the basis of race and gender, in defiance of federal civil rights laws and their equivalents at the state and local level that prohibit sexual orientation discrimination—just like the Boy Scouts of America and the organizers of the St. Patrick’s Day parade in Boston.<sup>33</sup>

Where there is no constitutional protection for economic association, there can be no constitutional protection for *forced* economic association.<sup>34</sup> In other words, even if the agency-shop arrangement constitutes forced association, there is no constitutional protection from compelled association with the union *in its collective bargaining capacity*. This fundamental point was not lost on the Wisconsin Supreme Court when several unions

---

30. Int’l Franchise Ass’n, Inc. v. City of Seattle, 803 F.3d 389, 408 (9th Cir. 2015).

31. *Id.* (alteration in original) (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011)).

32. See Bhagwat, *supra* note 21, at 999–1001 (explaining that First Amendment doctrine only protects a corporation’s political speech and the reasons for such limits).

33. Cf. Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000) (holding that forced inclusion of homosexual member pursuant to state antidiscrimination law violated the expressive rights of the organization); Hurely v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569–70 (1995) (upholding the right of parade organizers to exclude individuals to the degree their inclusion would distort the group’s conception of itself); *U.S. Jaycees*, 468 U.S. at 634 (O’Connor, J., concurring) (noting that “there is only minimal constitutional protection of the freedom of commercial association”); Cf. Bhagwat, *supra* note 21, at 1002 (drawing the contrast between protected associations, such as the Boy Scouts, and “commercial entities [which] have no right to discriminate, either as employers or in their choice of customers and contractual partners” and arguing that government regulation of the latter is appropriate since such entities “are not directed toward goals relevant to the democratic process”).

34. Cf. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 468, 477 (1997) (rebuffing compelled speech claim of agricultural producers, in a case in which statutorily imposed fees were used to fund generic commercial advertisements, on the ground that “being compelled to fund . . . advertising” did not raise a cognizable First Amendment claim but was instead “simply a question of economic policy for Congress and the Executive to resolve”).

challenged the previously mentioned budget repair law signed into law by Governor Walker.<sup>35</sup>

Union plaintiffs brought suit, arguing that the Wisconsin law significantly burdened their constitutionally protected right to associate.<sup>36</sup> The Wisconsin law effected four changes to the terms of public-sector employment. First, it prohibited “general employees,” defined to exclude police and firefighters, from collective bargaining on issues other than base wages.<sup>37</sup> Second, it barred municipal employers from collecting union dues through paycheck deductions.<sup>38</sup> Third, it prohibited government employers from agreeing to contracts that included fair-share service fees. And fourth, it required covered unions to undertake expensive “annual recertification elections,” whose costs would be assessed against the union.<sup>39</sup> Each, they argued, burdened the unions’ associational rights.

The Wisconsin Supreme Court, however, rebuffed these freedom of association claims on the ground that only association in the furtherance of expressive goals is protected under current doctrine. Focusing primarily on the limits placed on the topics subject to collective bargaining, the Wisconsin Court noted that constitutional protection only attaches “to associat[ion] for the purpose of engaging in [constitutionally protected] activities.”<sup>40</sup> The court, then, observed:

The right to associate is not derived from some ethereal notion that individuals be granted the right to organize for organization’s sake. Associational rights are rooted in the First Amendment’s protection of freedoms of speech and assembly. Stated differently, the right to engage in activities protected by the First Amendment drives the corresponding right to associate with others in order to engage in those activities.<sup>41</sup>

---

35. *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337 (Wis. 2014).

36. *Id.* at 351.

37. *Id.* at 354 (noting that the Wisconsin law at issue limited collective bargaining “to the single topic of . . . base wages” while setting statutory limits, which could only be overridden by a voter referendum, on increasing base wages). The fact that the unions exempted were more likely to endorse Republican candidates did not go unnoticed. *Wis. Educ. Ass’n Council v. Walker*, 705 F.3d 640, 643 (7th Cir. 2013) (observing that *all* five public-employee unions that endorsed “Governor Walker [when he] ran for election in 2010” were exempted from the state’s new restrictions on fair-share service fee requirements, but ultimately concluding that, while notable, the observation had no legal significance since some “employee organizations that opposed or failed to endorse the governor” also benefit from the exemption for “public safety employees”).

38. *Madison Teachers, Inc.*, 851 N.W.2d at 347.

39. *Id.* at 347, 351–52.

40. *Id.* at 352 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984)).

41. *Id.* at 357.

The unions' freedom of association was not burdened, it held, because the challenged provisions burden *only* their right to organize in the workplace, not their right to organize in the political sphere.<sup>42</sup>

The Wisconsin Supreme Court's analysis is sound—and extremely relevant in thinking about the appropriate way to analyze the compelled association claims in *Janus*.<sup>43</sup> The limits Wisconsin placed on the scope of bargaining (restricting the permissible scope of working conditions subject to negotiation and prohibiting negotiations for the use of paycheck deductions or the collection of fair-share service fees) do not burden union members' ability to associate for political purposes. As the Court noted "[t]he plaintiffs remain free to advance *any* position, on *any* topic, either individually or in concert, through any channels that are open to the public."<sup>44</sup> In fact, there were nationally televised protests of Governor

---

42. *Id.*

43. The Wisconsin Supreme Court's one error was its failure to explore the arguably important distinction between the curtailment of bargaining rights and the adoption of an onerous recertification requirement. Under the 2011 law, covered unions are required to undertake (and fund) an annual recertification election in which they must obtain the approval of an absolute majority of eligible voters to maintain their status as the exclusive bargaining representative. *Id.* at 360. The Court upheld this provision on the grounds that "there are no associational rights at stake" because "[t]he certification requirements apply solely to collective bargaining, which is wholly distinct from an individual's constitutional right to associate." *Id.* at 361 (maintaining that "it is impossible for these increased 'organizational penalties' to violate the plaintiffs' associational rights, when there are no associational rights at stake"). To be sure, formally this provision, like the others, pertains only to the employment context. The annual recertification does not *directly* burden individuals from continuing to participate in the union's expressive (and hence protected) activities. It does, however, *indirectly* burden the union's expressive organizational capacity—possibly even severely. *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The critical fact here is that union dues fund advocacy in relation to both constitutionally protected expressive and employment-related collective bargaining. By significantly raising the cost of collective bargaining, the new law effects a tax on the money available to spend on the union's protected advocacy. *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 7, 10, 37 (2011) (upholding the constitutionality of Congress's prohibition on providing "material support or resources" to certified terrorist organizations, as applied to the Humanitarian Law Project (an organization which sought to provide legal training and monetary support for the humanitarian and political activities of two designated terrorist organizations) on the grounds that "[m]oney is fungible" and, therefore, any money given to a "terrorist organization" to enable and support its ability to engage in peace negotiations necessarily frees up funds to be spent on its violent activities). The annual recertification requirement is radically different, for example, from paycheck deductions: The latter ease the burden of collecting union dues, but their absence does not affirmatively tax the union's civic coffers. In this regard, they are properly viewed as a state subsidy that cannot be constitutionally required. Now, some might object that the same problem of fungibility arises for a dissenting employee: The fee he pays take away from the money he has available for political advocacy. Fair-share service fees (like the requirement that unions independently collect dues rather than permitting paycheck deductions), however, are a cost imposed on doing business. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470 (1997) (noting that "[t]he First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget"). The annual recertification process, by contrast, is a cost imposed on the union *qua* civic association insofar as it uses its membership fees to promote unionism through membership organizing and and political advocacy.

44. *Madison Teachers, Inc.*, 851 N.W.2d at 355.

Walker's policies, successful Internet appeals to feed the protestors sitting in at the state house, as well as a subsequent recall effort.<sup>45</sup>

To the degree that only association in the furtherance of expressive goals is protected under current doctrine, the "freedom not to associate" must also be limited to a freedom not to associate with an *expressive* association covered by the First Amendment.<sup>46</sup> The two postulates are necessary corollaries. This doctrinal symmetry is required to vindicate the First Amendment's commitment to the principle of neutrality.<sup>47</sup> If the freedom of association does not protect unions from limits placed on the scope of collective bargaining, the freedom not to associate cannot protect nonunion members from being forced to participate in such employment-related negotiations. The two are corollaries of one another insofar as, in both cases, the association relates to workplace-related advocacy.

Finally, *Abood's* decision to uphold the constitutionality of fair-share service fees is doctrinally sound to the degree it vindicates the speech and association interests of all relevant parties. Under *Abood*, the freedom of speech and association of all employees, regardless of their views on unionism, are fully preserved. Employees who oppose unionism (like their counterparts who oppose legislation seeking to curtail public-sector unionism) are free to engage in all manner of political advocacy and association around such arrangements. Their right to associate, or refuse to associate, with constitutionally protected, expressive associations is fully preserved. Mark Janus is free to refuse to join the union *qua* civic association and, even more specifically, free to refuse to subsidize its political speech.<sup>48</sup> Janus is also free to join civic and political associations that oppose unionism. In fact, his participation in the current litigation is *prima facie* evidence of the preservation, under *Abood*, of the right of expressive association. As *Abood* explained—

A public employee who believes that a union representing him is

45. See Monica Davey & Steven Greenhouse, *Angry Demonstrations in Wisconsin as Cuts Loom*, N.Y. TIMES (Feb. 16, 2011), <http://www.nytimes.com/2011/02/17/us/17wisconsin.html> [perma.cc/VYX4-LSCC]; Steven Greenhouse, *Delivering Moral Support in a Steady Stream of Pizzas*, N.Y. TIMES (Feb. 25, 2011), <http://www.nytimes.com/2011/02/26/us/26madison.html> [perma.cc/SP3X-YZQG].

46. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate.").

47. See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408–09 (1986) (identifying a commitment to government neutrality as a central tenet of the First Amendment tradition); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 512–13 (1996) (offering theoretical justifications for the First Amendment's commitment to government neutrality between viewpoints).

48. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 515–19 (1991) (plurality opinion) (holding that nonunion employees may only be required to subsidize union spending that is "germane to collective bargaining"—on grounds that these are "justified by the government's vital policy interest in labor peace and avoiding 'free riders'"—and further that ideological activities, such as lobbying or informational picketing, are not germane).

urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint. Besides voting in accordance with his convictions, every public employee is largely free to express his views, in public or private orally or in writing. . . . [Moreover,] public employees are free to participate in the full range of political activities open to other citizens.<sup>49</sup>

*B. Resisting Determinism in First Amendment Jurisprudence*

Skeptics, of course, will argue that there is no tenable distinction between economic and political advocacy in the context of public-sector unions.<sup>50</sup> Isn't any advocacy by a public-sector union inherently political insofar as it inevitably implicates state budgets?<sup>51</sup> Under this reasoning, requiring nonunion employees in the public sector to a pay fair-share service fee is inherently a form of compelled subsidization of ideological speech. Justice Alito embraced this argument in *Harris v. Quinn*, writing:

In the private sector, the line [between collective bargaining and political advocacy] is easier to see. Collective bargaining concerns the union's dealings with the employer; political advocacy and lobbying are directed at the government. But in the public sector, both collective bargaining and political advocacy and lobbying are directed at the government.<sup>52</sup>

This argument, however, proves too much. As Justice Kagan quipped in response, the "Court has never come close to holding that any matter of public employment affecting public spending (which is to say most such matters) becomes for that reason alone an issue of public concern."<sup>53</sup>

---

49. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 230 (1977). In light of the fact that there was no indication in the record that the contract in question sought to limit nonunion employees public speech in any manner, the most reasonable interpretation of the qualification "largely," in the above quote, is that it is meant to refer to the fact that the speech of government employees can be constitutionally limited.

50. *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014) (noting the "conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends").

51. *Id.* at 2642.

52. *Id.* at 2632–33; see also Brief for the Petitioner at 10–11, *Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, Council 31, No. 16-1466 (U.S. Nov. 29, 2017) [hereinafter Brief of Petitioner Janus]; Brief for the Petitioners at 10–12, 25, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (No. 14-915) (mem.), *aff'g per curiam* No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014) [hereinafter Brief of Petitioners Friedrichs] (arguing that "the fiscal impact alone" of collective bargaining "makes it public-concern speech" because "there is no principled distinction between lobbying advocacy and collective-bargaining advocacy" insofar as the question of "how much money local government should devote to public employees" and related public policies, such as class-size, are inherently political "[i]n this era of broken municipal budgets and a national crisis in public education").

53. *Harris*, 134 S. Ct. at 2655 (Kagan, J., dissenting).

To decide that all employment-related advocacy is political advocacy where the government is the employer is to elide the pervasive distinction in constitutional law between the government *as sovereign* and the government *as proprietor*.<sup>54</sup> That distinction is central to the government-employee speech doctrine.<sup>55</sup> Government employees generally lack First Amendment protection with respect to “speech made pursuant to the employee’s official duties.”<sup>56</sup> By contrast, when they speak “as a citizen upon matters of public concern,” they are fully protected by the First Amendment.<sup>57</sup> As Justice Kagan pointedly noted in her *Harris* dissent, *Aboud* drew a line that “coheres with the law relating to public employees’ speech generally.”<sup>58</sup> It effectively determined that “speech within the employment relationship about pay and working conditions pertains mostly to private concerns and implicates the government’s interests as employer” while “speech in political campaigns relates to matters of public concern and has no bearing on the government’s interest in structuring its workforce.”<sup>59</sup>

The distinction between government as sovereign and government as proprietor also runs through the public forum doctrine, under which First Amendment rights are graduated in relation to the strength of the government’s ownership interest.<sup>60</sup> Early public forum cases acknowledged

---

54. The distinction also plays a central role in the so-called dormant Commerce Clause doctrine. *See, e.g., South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984) (holding that “[o]ur cases make clear that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities”); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (arguing that “[t]he basic distinction . . . between States as market participants and States as market regulators makes good sense and sound law” and justifies the market-participant exception to constitutional prohibition on discrimination against out-of-state interests); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (reasoning that “[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others”).

55. *Cf. Harris*, 134 S. Ct. at 2653 (Kagan, J., dissenting) (“This Court has long acknowledged that the government has wider constitutional latitude when it is acting as employer than as sovereign.”); *see also Autor v. Pritzker*, 740 F.3d 176, 183 (D.C. Cir. 2014) (“The Supreme Court has long sanctioned government burdens on public employees’ exercise of constitutional rights ‘that would be plainly unconstitutional if applied to the public at large.’”).

56. *Garcetti v. Ceballos*, 547 U.S. 410, 413, 424 (2006) (holding that “the First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities” even when that expression arguably implicates the public interest); *Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding that insofar as the employee’s questionnaire was “most accurately characterized as an employee grievance concerning internal office policy” that “touched upon matters of public concern in only a most limited sense . . . [her] discharge . . . did not offend the First Amendment”).

57. *Connick*, 461 U.S. at 147; *see also Lane v. Franks*, 134 S. Ct. 2369 (2014); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968).

58. *Harris*, 134 S. Ct. at 2654 (Kagan, J., dissenting).

59. *Id.*

60. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983); *see also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1749–52 (1987).

that a government could curtail otherwise constitutionally protected speech in forums over which the government has proprietary power.<sup>61</sup> Under the modern doctrine, whether a property is owned by a government as sovereign or as proprietor determines whether the property is considered public or private for First Amendment purposes.<sup>62</sup> Thus, citizens enjoy broad First Amendment protection when speaking in “public” forums like streets and parks, owned by the government as sovereign, but little to no protection when speaking in “nonpublic” forums like federal military bases, owned by the government as proprietor.<sup>63</sup>

To accept the broad argument that all speech directed to the government—even as an employer—is political is to constitutionalize all government workplaces, an outcome the Roberts Court itself has resisted as “inconsistent with sound principles of federalism and the separation of powers.”<sup>64</sup> As the Court explained in *Borough of Duryea v. Guarnieri*, the “unrestrained application” of First Amendment rights “in the context of government employment would subject a wide range of government operations to invasive judicial superintendence,” thereby creating a situation in which “[e]very government action . . . could present a potential federal constitutional question.”<sup>65</sup> This, the Court cautioned, “would raise serious federalism and separation-of-powers concerns.”<sup>66</sup>

In *Guarnieri*, a public employee argued that both his filing of a union grievance and his related lawsuit were protected by the First Amendment’s right to petition and, thus, the adverse employment consequences that resulted from these employment-related petitions amounted to unconstitutional retaliation for the exercise of constitutional rights.<sup>67</sup> Even Justice Scalia, who objected to the majority’s unwillingness to attend to the unique history and functions of the Petition Clause, maintained that “the Petition Clause protects public employees against retaliation for filing petitions *unless those petitions are addressed to the government in its capacity as the petitioners’ employer, rather than its capacity as their sovereign.*”<sup>68</sup> He too, in other words, sought to hold the line between government as employer and government as sovereign for constitutional purposes.

---

61. See Post, *supra* note 60, at 1723.

62. See *id.* at 1740–42.

63. Compare *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939), with *Greer v. Spock*, 424 U.S. 828, 838 (1976).

64. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

65. 564 U.S. 379, 390–91 (2011).

66. *Id.* at 391.

67. *Id.* at 382–84.

68. *Id.* at 407 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

At this point, some (myself included) may object that the existing freedom of association doctrine's focus on expressive associations is unduly limited.<sup>69</sup> Even assuming, however, that the very act of association is expressive—as John Inazu has persuasively argued—a plaintiff like Janus, in choosing to work in Illinois's unionized Department of Healthcare and Family Services rather than a nonunionized alternative, has already affirmatively chosen to associate (expressively).<sup>70</sup>

The bottom line is that in choosing to work for the government in a unionized setting, petitioners have already chosen association over non-association, *as employees*. There is no forced association of any kind.

Perhaps in recognition of these damning facts, nonunion members invariably recast their objection by invoking a slew of precedents from the Court's compelled speech doctrine. Rebecca Friedrichs, whose case against the California Teacher's Association was poised to strike down *Abood* until Scalia's unexpected passing, argued that her challenge was to “the largest regime of compelled political speech in the Nation.”<sup>71</sup> Taken in the most generous light, the argument appears to be: I may have freely chosen to work with these state employees, but I did not freely agree to these fair-share service fees.<sup>72</sup> Moreover, to the degree association is facilitated by speech, surely I, the unwilling participant, should be constitutionally protected from compelled subsidization of the union's speech.

To the degree the decision to work for a unionized state employer is a free one, the requirement to pay associated employment-related fees can only be construed as similarly voluntary. The “compelled” fair-share service fee is directly related to this affirmatively chosen association. Nonunion employees are only asked to pay this fee because they have freely chosen to

---

69. See, e.g., Abu El-Haj, *Friends, Associates, and Associations*, *supra* note 21, at 54–68, 99–103 & n.213 (arguing that to the degree nonexpressive associations further an array of First Amendment goals they ought to be protected); Bhagwat, *supra* note 21, at 999–1000 (arguing that the Court operates with too narrow a definition of “expressive associations” and that the doctrine should be expanded to cover a “wide range of broadly democratic associations that deserve First Amendment protection”); JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 1–6, 20–62, 156 (2012) (criticizing current doctrine for being insufficiently protective of dissenting associations and defending the need to provide robust protection for illiberal associations—defined as those that dissent from liberal values).

70. INAZU, *supra* note 69, at 160 (arguing that the Court's current doctrine is underprotective of dissenting associations and criticizing the distinction between “expressive and nonexpressive association” for “fail[ing] to recognize that . . . all associations have expressive potential” because “every associational act . . . has expressive potential”); John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1094–96 (2013) (arguing that associational boundaries are formed and maintained by excluding, embracing, expelling, and establishing—each of which are inherently expressive acts).

71. Brief of Petitioners Friedrichs, *supra* note 52, at 1.

72. See, e.g., *Janus v. Am. Fed'n of State, Cty. & Mun. Emps. Council 31*, 851 F.3d 746 (7th Cir. 2016), *cert. granted*, 138 S. Ct. 54 (U.S. Sept. 28, 2017) (No. 16-1466).



associate *as employees* with their unionized co-workers.<sup>73</sup> They have chosen to become state social workers or public school teachers—rather than working for private social work agencies or charter or private schools—in full knowledge that they have chosen a unionized work setting, with higher wages.

To suggest otherwise is to fundamentally misconceive the nature of coercion in a liberal legal order. As Justice Cardozo aptly observed, in the not unrelated context of monetary incentives:

[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. . . . [It] is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.<sup>74</sup>

Some will object that this risks returning us to Justice Holmes's view that an individual "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>75</sup> It does not. Fair-share service fees do not impinge any employee's "constitutional right to talk politics" by forcing a choice between employment and exercising rights protected by the freedom of speech or association.<sup>76</sup> No one—pro- or anti-union—is asked to give up a constitutional right in order to remain employed.<sup>77</sup>

Put differently, these are not unconstitutional conditions cases. To claim that "agency-shop arrangements in the public sector . . . force individuals to contribute money to unions as a condition of government employment" fundamentally misconstrues the unconstitutional conditions doctrine.<sup>78</sup> The unconstitutional conditions doctrine prohibits the government from conditioning access to its largesse (including benefits, licenses, tax exemptions, and government employment) but not to its cash (the term of art is "subsidies") on the giving up of a constitutional right.<sup>79</sup> It provides

---

73. Cf. *Guarnieri*, 564 U.S. at 387 (observing that "the consensual nature of the employment relationship" justifies limiting First Amendment rights in certain contexts).

74. *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937).

75. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (upholding the dismissal of a police officer for engaging in political activity, including joining a political committee). But see *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716–17 (1996) ("The Court has rejected for decades now the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights, a doctrine once captured in Justice Holmes' aphorism that although a policeman 'may have a constitutional right to talk politics . . . he has no constitutional right to be a policeman.'").

76. *McAuliffe*, 29 N.E. at 517.

77. See *supra* notes 54–59 and accompanying text.

78. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007).

79. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 198 (1991) (upholding federal regulations prohibiting the use of Title X funds for abortion-related speech); *Lyng v. Int'l Union, UAW*, 485 U.S.

that “even though a person [may have] no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons,” the government may not deny said benefit to penalize him for exercising “his constitutionally protected speech or associations.”<sup>80</sup> More specifically, in the context of government employment, it has entailed that “public employer[s may not] . . . leverage the employment relationship to restrict, incidentally or intentionally, the [First Amendment] liberties employees enjoy in their capacities as private citizens.”<sup>81</sup>

The paradigmatic unconstitutional conditions cases, in the context of government employees, involve scenarios like those invoked by Justice Holmes: A government employee is terminated for participating in disfavored expression or association.<sup>82</sup> In *Elrod v. Burns*, for instance, the Court held that it was unconstitutional for the newly elected Democratic sheriff to require employees to “pledge their political allegiance to the Democratic Party” in order to maintain their employment.<sup>83</sup> Similarly, in *Branti v. Finkel*, the Court found the New York public defender in violation of the First Amendment for implicitly conditioning continued employment on transferring political loyalty to the governing party.<sup>84</sup> In other words, the unconstitutional conditions doctrine is predicated on Justice Stone’s apt recognition that, “Threat of loss, not hope of gain, is the essence of . . . coercion.”<sup>85</sup>

Agreements requiring fair-share service fees do not impose an unconstitutional condition on the voluntary act of employment because they do not require dissenting employees to relinquish any First Amendment rights—speech or association—as a condition of employment. They do not force state employees to join the union *qua* civic association as a condition of employment. Nor do they forbid nonunion employees from exercising

---

360 (1988) (upholding constitutionality of congressional decision to deny food stamps to striking workers); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 564 (1968) (vindicating First Amendment claim of a teacher who was “dismissed from his position . . . for sending a letter to a local newspaper in connection with a recently proposed tax increase”); *see also* *Autor v. Pritzker*, 740 F.3d 176, 182 (D.C. Cir. 2014) (suggesting that the doctrine only “require[s] the benefit . . . to have measurable economic worth” to be subject to the test).

80. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

81. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

82. *See, e.g., Perry*, 408 U.S. at 594 (involving alleged dismissal of an untenured college professor in retaliation for his participation in an association seeking to lobby legislature for tenure protections); *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589 (1967) (challenging conditioning eligibility for a teaching position on nonmembership in a subversive organization).

83. 427 U.S. 347, 351, 355 (1976) (finding the practice of discharging employees “solely because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders” to be a significant “restraint . . . on freedoms of belief and association”).

84. 445 U.S. 507 (1980); *see also* *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).

85. *United States v. Butler*, 297 U.S. 1, 81 (1936).

their constitutional right to speak out against unionism.<sup>86</sup> Finally, to the degree the fees further speech, they further only the union's efforts to communicate with government officials *qua* employer (not *qua* sovereign).<sup>87</sup>

As with the union's challenge to Wisconsin's restrictive labor law, here too, the government has "not bar[red] [its employees] from joining any advocacy groups, limit[ed] their ability to do so, or otherwise curtail[ed] their ability to join other 'like-minded individuals to associate for the purpose of expressing commonly held views.'"<sup>88</sup> Nonunion employees are free to refuse to join the union, free to associate with right-to-work groups, and free to speak to advance their views (including engaging in litigation and lobbying). In sum, mandatory fair-share service fees are nothing like the provision of Philadelphia's Charter, which the Third Circuit recently struck down, that prevented police officers from making voluntary contributions to the union's political action committee.<sup>89</sup>

This is not to deny that many employees who accept unionized public-sector jobs are likely to object to any number of the bargaining units' policies. Young, talented teachers may object to a system in which promotions and pay are related to seniority rather than merit. Math and science teachers might prefer pay scales tied to education.

These employees are, however, in no worse situation than dissenting members of any civic association. When the Boy Scouts of America adhered to a policy of excluding openly gay members from positions of leadership, no doubt there were many families who did not approve. Like those dissenting members, these dissenting public-sector employees have many opportunities to express their reservations. They can remain on the

---

86. In fact, they do not even place an indirect burden on such speech as the federal law which "broadly prohibit[ed] federal employees from accepting any compensation for making speeches or writing articles" arguably did. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 457 (1995).

87. The above is a defense of *Abood* as a matter of First Amendment doctrine and principle. It is, of course, possible—indeed likely—that operationalizing the line between employment-related advocacy and political advocacy requires refining. See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 550 (1991) (Scalia, J., concurring in part and dissenting in part) (arguing that "[a] union may constitutionally compel contributions from dissenting nonmembers in any agency shop . . . only for the costs of performing the union's statutory duties as exclusive bargaining agent"); see also Brief for Amici Curiae Charles Fried & Robert C. Post in Support of Neither Party at 3–4, *Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, Council 31, No. 16-1466 (U.S. Dec. 6, 2017) (arguing for replacing the current germaneness test with one that permits the collection of fees related to statutory duties alone in the interest of preserving the appropriate balance between competing speech rights).

88. *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337, 356 (Wis. 2014) (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012)).

89. *Lodge No. 5 of the Fraternal Order of Police v. City of Philadelphia*, 763 F.3d 358, 360, 384 (3d Cir. 2014) (striking down charter provision that barred "police officers from making donations 'received by a candidate . . . for use in advocating or influencing the election of the candidate,' or . . . 'received by a political committee, political party, or partisan political group'" on the ground that it was not "closely drawn" to the city's purported interests).

workforce and lobby their employer in its sovereign capacity to restrict the parameters of collective bargaining, testifying in favor of merit- and market-based pay scales and against fair-share service fees. They could choose to join the union and seek to change its rules internally, or they could exit, in frustration, by moving to a nonunionized work setting or a right-to-work state. To suggest that these choices are not free is, as Justice Cardozo recognized, to “accept[] . . . a philosophical determinism by which choice becomes impossible.”<sup>90</sup>

*C. Beyond Doctrine: Reaffirming Abood as a Matter of First Amendment Principles*

*Abood*’s central holding is also sound as a matter of First Amendment principle. It creates a constitutional order which preserves the full range of First Amendment rights without intruding on a core legislative domain—labor regulation. In doing so, it strikes exactly the sort of balance between the freedom of speech and the freedom of association that a jurisprudence attentive to the First Amendment as a whole, rather than the free speech clause in isolation, demands.

First, *Abood* underwrites a legislative prerogative to determine economic policy.<sup>91</sup> It preserves legislative decisions to regulate—and, in the spirit of federalism, a range of legislative decisions—in order to offset the collective action problems likely to result were unions required to provide representation for nonmember employees without being able to collect fees from them.

Second, the First Amendment establishes not only an open marketplace of ideas, but also an open marketplace of civic associations. *Abood* allows both postulates to be respected. First, it frees nonunion members from compelled association with the union *qua* civic association and from compelled political contributions. It, thereby, vindicates the individual’s First Amendment right to choose to dissent from the project of unionism and to join opposing political associations. Second, it refuses to extend to that same individual a First Amendment right to refuse to pay fees to cover employment-related representation. It, thereby, underwrites the First Amendment’s structural interest in providing protection to the sorts of civic organizations that foster informed political participation.

The claim here is not that *Abood* is normatively sound because it props up unions. Rather, the claim is that *Abood* is sound because it leaves in place the status quo—a highly imperfect pluralist chorus through which the

90. Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937).

91. See *Madison Teachers, Inc.*, 851 N.W.2d at 355 (noting “[i]t is a prerogative of a state to establish workplace policy”).

public collectively seeks to produce democratic accountability, a chorus in which unions play an important, if shrinking, part.

By contrast, any decision expanding the compelled speech doctrine to protect nonunion members from being required to pay a fair-share service fee risks constitutionalizing a labor regime that could quickly lead to the tragedy of the commons. Even pro-union workers might make the economically rational decision to withhold their fees, hoping that others will fund the union. The relevant free-rider problem, from the perspective of the freedom of association, in other words, is not that nonmembers—those who oppose unionism, like Janus—will free ride on the union’s effort, as Justice Alito claims.<sup>92</sup> It is, rather, the incentives such a labor regime would create for individuals who genuinely support the union.<sup>93</sup>

Under the labor law regimes adopted by states like Illinois and California, there is no similar opportunity to free ride. Both union and nonunion employees are required to pay their fair share of the employment-related representation that the union has a duty to provide on an equal basis. As Justice Scalia explained—

Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them . . . . [P]rivate speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the “free riders” [in unions] . . . is that . . . the law *requires* the union to carry [them]—indeed, requires the union to go out of its way to benefit [them], even at the expense of its other interests . . . . [T]he free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.<sup>94</sup>

What Justice Scalia failed to play out is that this also means that compelled fair-share service fees are necessary to counteract the very real, free-rider problem that would arise *among members* if such fees were optional.

---

92. *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 311 (2012) (explaining that “[t]he primary purpose” of permitting unions to collect fees from nonmembers . . . is “to prevent nonmembers from free-riding on the union’s efforts, sharing the employment benefits obtained by the union’s collective bargaining without sharing the costs incurred” while emphasizing that “[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections”) (emphasis added) (quoting *Davenport v. Wash. Educ., Ass’n*, 551 U.S. 177, 181 (2007)). To be clear, my claim is not that the nonunion member free-rider problem is unimportant; it is, instead, that this second free-rider problems is particularly important given the broader structural interests of the First Amendment.

93. *See Harris v. Quinn*, 134 S. Ct. 2618, 2656 (2014) (Kagan, J., dissenting) (“In such a circumstance, not just those who oppose but those who favor a union have an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain their support.”).

94. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part).

To be sure, the actual risks that pro-union members will withhold fees are highly contentious, and right-to-work advocates are quick to cite evidence that unionism will survive the abolition of fair-share service fees. Beyond the fact that the federal work force is unionized in the absence of such fees,<sup>95</sup> some are quick to point out that states like Nevada, Iowa, Florida and Nebraska, which permit unions to become the exclusive representatives of workers, but forbid the collection of mandatory fair-share service fees, have relatively high rates of public-sector union membership—37.9 percent in Nevada, 27.9 percent in Iowa, 27.2 percent in Nebraska.<sup>96</sup>

The empirical uncertainty regarding the effect abolishing fair-share service fees will have on union membership levels is a product of a variety of factors. First, it is often difficult to draw conclusions from studies comparing right-to-work and pro-union states because the two types of states tend to vary along a range of relevant characteristics.<sup>97</sup> Second, right-to-work laws, historically at least, have been enacted in states whose unions are weak; thus, little of interest is to be gleaned from the fact that there is not a drop in unionism.<sup>98</sup> Finally, right-to-work laws themselves vary significantly.<sup>99</sup>

But the very fact that the risks are uncertain points to the legislature as the proper forum for resolving the debate. As we have seen, *Abood* does not permit states to force the subsidization of the union's political speech. It prevents constitutionalizing a policy choice that risks creating significant

---

95. Compare *Harris*, 134 S. Ct. at 2640 with *id.* at 2657 n.7 (Kagan, J., dissenting) (citing RICHARD C. KEARNEY & PATRICE M. MARESCAL, *LABOR RELATIONS IN THE PUBLIC SECTOR* 26 (5th ed. 2014) which notes that “[T]he largest federal union, the American Federation of Government Employees (AFGE), represented approximately 650,000 bargaining unit members in 2012, but less than half of them were dues-paying members” and further that “out of the approximately 1.9 million full-time federal wage system (blue-collar) and General Schedule (white-collar) employees who are represented by a collective bargaining contract, only one-third actually belong to the union and pay dues”); see also Brief of Amici Social Scientists in Support of Respondents, *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915) (mem.), *aff’g per curiam* No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014) [hereinafter Brief of Amici Social Scientists].

96. Amicus Curiae Brief of National Right to Work Legal Defense Foundation, Inc., in Support of Petitioners at 18 n.12, *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915) (mem.), *aff’g per curiam* No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014) (citing Chris Edwards, *Public Sector Unions and the Rising Costs of Employee Compensation*, 30 CATO J. 87, 106 (2010)) [hereinafter Brief of NRTWLD Foundation]. Other right-to-work states preclude exclusive representation. In these states, public-sector union membership is very low: 4.2 percent in Georgia, 5.2 percent in Virginia, 6 percent in Mississippi, and 8.2 percent in South and North Carolina. *Id.*

97. See James Feigenbaum et al., *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws* 5 (Jan. 2018) (unpublished manuscript) (on file with author) (noting that “[o]ne major obstacle to identifying the effects of [Right-to-Work] laws comes from the fact that states that pass such measures are often very different from non-[Right-to-Work] state across a number of important economic, social, and political dimensions that could themselves account for the differences in future outcomes”).

98. I want to extend a particular thanks to Professor Alexander Hertel-Fernandez, an expert in the area, for explaining the axes of this debate to me.

99. See Brief of Amici Social Scientists, *supra* note 95, at 16–19.

collective action dilemmas—leaving it, instead, to state legislatures to decide how to assess such risk.

The unrecognized virtue of *Abood*, in other words, is that it permits some states, like Illinois and California, to create a labor regime in which there is no opportunity to free ride, and other states, such as Nevada and West Virginia, to do otherwise. It recognizes that the First Amendment not only establishes an open marketplace of ideas, but also an open marketplace of civic associations. Most importantly, in doing so, it vindicates an appropriate balance between freedom of speech and association: It does not jeopardize eroding the kinds of civic associations that make responsive and responsible governance more possible on the basis of questionable individual free speech claims.

In sum, although it is doubtful that it will, the Supreme Court ought to reaffirm the constitutionality of fair-share service fees.<sup>100</sup> A decision in favor of the *Janus* plaintiffs permits the First Amendment to be used to undermine the very sorts of civic organizations that the First Amendment is meant to protect. In this regard, it is not only misguided as a matter of existing doctrine, but also undesirable as a matter of First Amendment principle. The Court should leave the ideological fights over unionism to the political process where they belong and refrain from constitutionalizing a labor regime that may well erode one of the essential prerequisites of representative government that the First Amendment was designed to protect: a pluralist civil society comprised of membership-based organizations that foster informed political participation.

## II. BEYOND JANUS: THE CONSTITUTIONALITY OF STATE-SANCTIONED EXCLUSIVE BARGAINING

Given that a divided Supreme Court is likely to reverse *Abood*, it is incumbent to explain how the arguments made above resonate beyond the specific issue under consideration in *Janus*. The simple answer is that *Janus* is only the beginning.<sup>101</sup> The freedom of association analysis laid out above provides an antidote to the superficial appeal of the First Amendment claims, percolating in the lower courts, by public-sector employees who oppose statutory entitlements to create exclusive bargaining units. There can be no return from the *Lochnerian* precipice until lawyers muster a compelling First Amendment argument for the status quo—one which

---

100. The petitioner in *Janus* have invoked the freedom of association. See generally Brief for Petitioner Janus, *supra* note 52. However, neither party has devoted significant attention to the nuances of freedom of association doctrine.

101. See generally Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 344–48 (2016) (summarizing recent litigation that “ask[s] the courts to go beyond overruling *Abood*”).

explains why the doctrinal status quo vindicates core First Amendment principles. The rote invocation of the importance of fealty to precedent will not be enough.<sup>102</sup>

A second thread of litigation percolating in the lower courts challenges the very constitutionality of state-sanctioned exclusive bargaining units—so-called “compelled” unionism.<sup>103</sup> Plaintiffs argue that the very establishment of a statutory right to organize an exclusive bargaining unit infringes upon the First Amendment rights of dissenting members. In *Hill v. Service Employees International Union*, for example, plaintiffs challenged Illinois’s Public Labor Relations Act, which permits over 60,000 in-home, healthcare and childcare providers, whose private employment is reimbursed by the State, to unionize.<sup>104</sup> Plaintiffs argued that the creation of a statutory right to establish an exclusive bargaining unit, pursuant to an election, infringed upon the constitutional rights of dissenting members.<sup>105</sup> The scheme, they argued, was unconstitutional notwithstanding the fact that personal and childcare providers are not required to join the union or pay fair-share services fees.<sup>106</sup>

Lower courts, to date, have dismissed these claims<sup>107</sup> on the ground that *Minnesota State Board for Community Colleges v. Knight* forecloses them.<sup>108</sup> In *Knight*, a group of community college professors challenged the constitutionality of the Minnesota Public Employment Labor Relations Act, which permitted state workers (as well as those working for localities and administrative agencies) to designate, by majority vote, an exclusive bargaining agent to negotiate on their behalf with respect to conditions of

---

102. See, e.g., *Harris v. Quinn*, 134 S.Ct. 2618, 2644–45 (2014) (Kagan, J., dissenting) (opening her dissent with “*Abood v. Detroit Bd. of Ed.* answers the question presented in this case” and her analysis with “I begin where this case should also end—with this Court’s decision in *Abood*”) (citation omitted). The unions’ primary argument each time the issue has been before the Supreme Court has emphasized the need for fealty to precedent. See Brief for Respondent American Federation of State, County, and Municipal Employees, Council 31 at 1–2, 16, 18–20, *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, Council 31, No. 16-1466 (U.S. Jan. 12, 2018); Brief of Respondents California Teachers Association, et al. in Opposition at 10–13, *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915) (mem.), *aff’g per curiam* No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014).

103. See, e.g., *Hill v. Serv. Emps. Int’l Union*, 850 F.3d 861 (7th Cir. 2017); *D’Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016) (Souter, J.).

104. *Hill*, 850 F.3d at 862.

105. *Id.*

106. *Id.* at 864 (holding further that the fact that *Harris v. Quinn* held states could not mandate fair-share services fees for such quasi-workers does not imply that the state may not provide such workers an opportunity to unionize and to establish an exclusive bargaining unit).

107. See, e.g., *D’Agostino*, 812 F.3d at 240; *Jarvis v. Cuomo*, 660 Fed. App’x 72 (2d Cir. 2016) (unpublished opinion); *Bierman v. Dayton*, 227 F. Supp. 3d 1022 (D. Minn. 2017), *appeal docketed*, No. 17-1244 (8th Cir. Feb. 2, 2017); *Mentele v. Inslee*, No. C15-5134-RBL, 2016 WL 3017713 (W.D. Wash. 2016). The challenged statutes do not require employees to join the union, and most of them also do not require fair-share service fees.

108. 465 U.S. 271, 273–74 (1984).



employment.<sup>109</sup> The Act obliged government employers to “meet and negotiate” in good faith on the “terms and conditions of employment” with any exclusive bargaining unit established pursuant to the Act; at the same time, it prohibited employers from meeting or conferring with any employee, other than the designated agent, once an exclusive bargaining unit had been established.<sup>110</sup> The statute provided a narrow carve out for professional employees, including college faculty; under this carve out, certain professionals were granted a right to “meet and confer” with their employers on policy matters “*outside the scope* of mandatory bargaining.”<sup>111</sup>

The *Knight* plaintiffs challenged the limitations placed on their ability to “meet and confer” with government employers—but, interestingly, not the exclusive authority of the bargaining unit to negotiate on their behalf with respect to conditions of employment.<sup>112</sup> The Supreme Court, however, was not persuaded that the contract presented a significant constitutional burden, essentially accusing the plaintiffs of conflating their First Amendment right to speak and associate—which had not been burdened—with a nonexistent “right to be heard by public bodies making decisions of policy.”<sup>113</sup> On this point, the Court was unequivocal: “Nothing in the First Amendment or in this Court’s case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers *to listen* or respond to individuals’ communications on public issues.”<sup>114</sup> In explicating why no First Amendment rights had been burdened, the Court emphasized that the statute did not prevent faculty members, in their individual capacities, to speak on matters related to public policy or to submit advice or recommendations through work channels, and it did not restrict their individual freedom to associate (or refuse to associate) with others (including the union).<sup>115</sup>

---

109. *Id.*

110. *Id.* at 274–76 (noting further that the State Board for Community Colleges viewed the union representatives as providing “the faculty’s official collective position”).

111. *Id.* at 273–74 (emphasis added) (explaining that scope of mandatory bargaining was defined to include “the hours of employment, the compensation, . . . and the employer’s personnel policies affecting the working conditions of the employees”).

112. *Id.* at 301 (Stevens, J., dissenting) (noting that “[i]n this appeal, there is no dispute that Minnesota may limit the process of negotiation on the terms and conditions of public employment to the union that represents the employees in a given collective bargaining unit”).

113. *Id.* at 283 (noting further that there is “no constitutional right to force the government to listen to [one’s] views” even in higher education and that the long tradition of faculty participation in governance at universities is a matter of good policy only).

114. *Id.* at 285 (emphasis added) (citing *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463 (1979)).

115. *Knight*, 465 U.S. at 288 (“The state has in no way restrained appellees’ freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative. Nor has the state attempted to suppress any ideas.”).

*Knight* notwithstanding, it is clear that libertarian, right-to-work advocates seek to persuade the Supreme Court to unsettle the constitutionality of exclusive bargaining units in the public sector and beyond. Their determination will be further fortified if the Court overrules *Abood* this term.

Unlike the challenges to fair-share service fees, a decision to overrule *Knight* would call into question the heart of the New Deal Court's compromise, which left to legislative prerogative basic economic and labor policy in rejection of *Lochnerism*. In particular, it would raise significant questions about the constitutionality of private-sector unions, which are also statutorily authorized.<sup>116</sup>

First Amendment challenges to the very existence of state-sanctioned exclusive bargaining in the public sector fare no better under existing freedom of association doctrine than challenges to fair-share service fees. First, as with fair-share service fees, there is no forced association of any kind. Fair-share service fees, as we saw, are specifically charged to cover employment-related advocacy directly resulting from the voluntary choice to join a unionized employment setting. They cannot, therefore, be reasonably construed as compelled. The same analysis applies in challenges to state-sanctioned exclusive bargaining units. Dissenting employees have affirmatively chosen to join an employment situation governed by a bargaining unit. The nonunion employees only find themselves in their predicament because of that voluntary choice.

Second, even if one were to question the voluntariness of this association, there is no constitutionally recognizable compelled association because the state has only mandated that its employees associate for economic purposes with the union in its non-expressive activity.<sup>117</sup> As with fair-share service fees, the exclusive bargaining unit is *not* the kind of association to which the freedom of association attaches. The union, as economic association, does not qualify as an expressive association under existing First Amendment doctrine. Accordingly, there can be no First Amendment bar to forced association with them.

---

116. See *White v. Commc'ns Workers of Am., AFL-CIO, Local 13000*, 370 F.3d 346, 349 (3d Cir. 2004) (rejecting the argument that the union was a state actor while "not[ing] . . . that the courts of appeals are divided on the question whether actions taken by a union pursuant to an agency-shop provision in a collective bargaining agreement constitute state action" and "[t]he Supreme Court has explicitly left this issue open"); cf. *Clark v. City of Seattle*, No. C17-0382RSL, 2017 WL 3641908, at \*3 (W.D. Wash. 2017) (noting that the plaintiffs' First Amendment challenge to a Seattle Ordinance that provided opportunity for for-hire drivers, who operated as independent contractors, to unionize failed, in part, because they "ma[de] no attempt to show that the legislative authorization for exclusive collective negotiations, standing alone, constitutes impermissible government interference in the marketplace of ideas").

117. See *supra* notes 24–33 (explaining why employment-related association cannot be construed as expressive under existing freedom of association doctrine).

The charge that granting exclusive bargaining authority “is extraordinary” insofar as “[f]ew, if any, other advocacy organizations are vested with the power to force government policymakers to meet and negotiate with them over public policies, much less bind government to follow certain policies”—despite its rhetorical flare—is meritless.<sup>118</sup> The reason “vaunted political powerhouses like the AARP and National Rifle Association lack authority to force government to negotiate with them over retirement or firearm policies that affect their members” is because such associations interact with the state *qua* sovereign, whereas the union, in its collective bargaining capacity, interacts with the state only *qua* employer.<sup>119</sup> When a union seeks to engage with state *qua* sovereign, as civic association—that is when it seeks to privately or publicly lobby the legislature or individual representatives as the AARP or NRA does—it too has no guaranteed seat at the table.

Third, and critically, dissenting employees’ freedom of expressive association, like their freedom of speech, is fully preserved: They remain free to express their opposition to unionism as individuals and by joining advocacy groups (including the National Right to Work Committee and its local affiliates) and free to lobby the state to repeal laws that facilitate a robust form of unionism.<sup>120</sup> They are similarly free to refuse to join the union (*qua* civic association) and free to refuse to subsidize its political speech.

These freedoms, moreover, explain why the existence of exclusive bargaining units in the public sector does not constitute an unconstitutional condition. State-sanctioned exclusive bargaining units do not create situations where the state has dictated what its employees can say or with whom they must associate.

This point bears some emphasis because the D.C. Circuit recently held that while *Knight* vindicates the government’s freedom to choose its advisors, it does not preclude the application of the unconstitutional conditions doctrine.<sup>121</sup> The case, *Autor v. Pritzker*, involved a challenge to an executive order issued by President Obama that “bar[red] federally

---

118. Brief of NRTWLD Foundation, *supra* note 96, at 9–10.

119. *Id.*

120. *About The National Right to Work Committee*, NAT’L RIGHT TO WORK COMM. <https://nrtwc.org/about/> [<https://perma.cc/P8CG-DQ5E>] (describing itself as a “national grass-roots organization in America dedicated exclusively to combatting the evils of compulsory unionism”).

121. *Autor v. Pritzker*, 740 F.3d 176, 180 (D.C. Cir. 2014) (“Like the state in *Knight*, the government insists that it has ‘simply restricted the class of persons to whom it will listen in its making of policy.’”). The government also argued for sweeping presidential power to choose its advisors, which the D.C. Circuit rejects as both overbroad and inopposite insofar as ITAC is a congressionally created advisory board. *Id.* at 179–80.

registered lobbyists from serving on advisory committees.”<sup>122</sup> Plaintiffs, a group of registered lobbyists, argued that the order amounted to an unconstitutional condition because the only way to remain eligible to serve on an advisory committee (such as the Industry Trade Advisory Committee) is to forgo one’s “First Amendment right to petition government.”<sup>123</sup> The district court had rejected these claims on the ground that *Knight*’s recognition of the government’s freedom to choose its advisors precluded the application of the unconstitutional conditions doctrine.<sup>124</sup> The D.C. Circuit was not persuaded: The government’s right to choose with whom it will confer does not permit it to make the giving up of a constitutional right a prerequisite for eligibility to be a chosen advisor.<sup>125</sup> Unlike President Obama’s executive order, however, state-sanctioned exclusive bargaining units do not require government employees to give up any First Amendment rights as a prerequisite for eligibility for state employment.

Finally, *Knight* leaves labor policy to legislatures and the political process per the New Deal compromise. It preserves the opportunity for unions to succeed in the political process—for example, to secure the privilege to negotiate for an exclusive bargaining unit—just as it preserves a similar opportunity for right-to-work advocates to succeed in the rough-and-tumble of politics. In fact, as it happens, it leaves these matters to the states: The political safeguards of federalism have worked, and Congress has been persuaded to leave the most controversial form of unionism—public-sector unionism and agency and closed shops—to the states themselves.<sup>126</sup>

Somewhat encouragingly, when plaintiffs squarely asserted their opposition to state-mandated exclusive bargaining as a challenge to compelled association, the first of these points was not lost on the district court. *Bierman v. Dayton* involved a challenge to a Minnesota statute that authorized in-home care providers, paid through the state’s Medicaid

---

122. *Id.* at 177 (noting, further, that the order applied only to a narrow group of lobbyists—those required to register under the Lobbying Disclosure Act—and was justified as an effort “to reduce the ‘culture of special interest access’”).

123. *Id.* at 183.

124. *Id.* at 180.

125. *Id.* at 181 (concluding “*Knight* does not control this case” because while *Knight* “recognized that the government may choose to hear from some groups at the expense of others, it never addressed the question . . . whether, in so doing, the government may also limit the constitutional rights of those to whom it chooses to listen”).

126. *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 355 (2009) (noting that the First Amendment neither requires the government to aid speech or association nor prohibits it from doing so—that choice is fundamentally a choice for state legislatures and, in our federalist union, as we would anticipate, different states make different choices). As previously mentioned, the National Labor Relations Act does not cover state and local employees. See 29 U.S.C. § 152(2) (expressly excluding state and political subdivisions from its definition of “employer”).

program, to unionize upon a thirty percent ballot.<sup>127</sup> It was brought by a group of parents who received compensation through Medicaid for the provision of in-home care to their disabled children. The plaintiffs argued that the arrangement violated their First Amendment right not to associate with the certified exclusive bargaining unit.<sup>128</sup> In rejecting their claims, the district court found the forced association claim untenable: Not only had the child care providers not been forced to join the union, or prevented from joining groups that opposed collective bargaining, but they had willingly created the alleged constitutional violation.<sup>129</sup> The district court went so far as to observe that the plaintiffs were perfectly free to choose to provide in-home care to their disabled children without compensation from the state.<sup>130</sup> The court concluded that to the degree state compensation drove the “employment” relationship, it was an association the plaintiffs affirmatively chose.

Although the arguments against overturning *Knight* are similar in many respects to those that caution against overturning *Abood*, there is one respect in which they are even stronger: A decision to overrule *Knight* implicates far more than just unions, having wide ramifications for federal administrative agencies.

A driving concern throughout *Knight* was that a decision in favor of the plaintiffs would effectively create a constitutional entitlement to be heard by public policymakers.<sup>131</sup> The First Amendment rights to speak and petition, it warned, do not entail a “constitutional right to force the government to listen to [one’s] views.”<sup>132</sup> Even in higher education, the long tradition of faculty participation in governance is merely a matter of good policy.<sup>133</sup> On this point, the Court was unequivocal: “Nothing in the First Amendment or in this Court’s case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers *to listen* or respond to individuals’ communications on public issues.”<sup>134</sup>

*Knight*, in other words, is of a piece with *Bi-Metallic Investment Co. v. State Board of Equalization*, which held that there is no individualized

---

127. 227 F. Supp. 3d 1022, 1024 (D. Minn. 2017), *appeal docketed*, No. 17-1244 (8th Cir. Feb. 2, 2017).

128. *See id.* at 1028–29.

129. *Id.* at 1029.

130. *Id.*

131. Minn. State Bd. for Cmty. Colls. v. *Knight*, 465 U.S. 271, 283 (1984) (chastising petitioners for conflating their First Amendment right to speak and associate—which had not been burdened—with a nonexistent “right to be heard by public bodies making decisions of policy”).

132. *Id.* at 283.

133. *Id.*

134. *Id.* at 285 (emphasis added) (relying on *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463 (1979), a case which had rejected a First Amendment challenge brought by a public union that objected to an arrangement where public employers refused to process individual grievances through the union).

constitutional right to a hearing before a rulemaking body, when it adopts a “rule of conduct appl[ying] to more than a few people.”<sup>135</sup> Nor was the *Knight* Court’s position driven exclusively by practical concerns. As in *Bi-Metallic* itself, the *Knight* Court argued that the republican form of government precludes such an entitlement, observing that “[i]t is inherent in a republican form of government that direct public participation in government policymaking is limited.”<sup>136</sup> It, further, emphasized: “Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted.”<sup>137</sup>

In the end, both the sweeping practical implications and entrenched understanding of republicanism offer reasons to believe the Roberts Court will hesitate when the invitation to overturn *Knight* arises. That said, a compelling account, grounded in existing freedom of association doctrine, as well as basic First Amendment principle, could go a long way toward reinforcing that instinct.

On the other hand, if the Court does overrule *Knight*, there will be significant ramifications for unions—even beyond the public sector. Unlike the challenges to fair-share service fees, a decision to overrule *Knight* would not be self-limiting to the public sector. The challenge in *Janus* turns on the (mistaken) position that the terms and condition of state employment are necessarily political insofar as they implicate not only educational or law enforcement policy, but also state budgets.<sup>138</sup> The silver lining is that there is no way to transport that argument to the context of negotiations with private-sector employers.

There would be no similar silver lining for private-sector unions were the Court to overrule *Knight*. The primary objection to exclusive bargaining units is that, at the behest of the state action, they prevent individuals from negotiating with their employers on an individual basis.<sup>139</sup> If the First Amendment bars a state from enabling the creation of an exclusive bargaining unit in the public sector because it infringes on an individual employee’s right to advocate for himself with respect to employment, the bar applies equally where the employer is private and the governmental actor is Congress. Labor relations in the private sector—with only minor exceptions—are governed by federal law. Federal statutes—primarily the

---

135. 239 U.S. 441, 445 (1915).

136. *Knight*, 465 U.S. at 285.

137. *Id.* at 284.

138. See *supra* notes 50–53 and accompanying text (discussing why the distinction is misguided).

139. See, e.g., *Clark v. City of Seattle*, No. C17-0382RSL, 2017 WL 3641908 at \*3–4 (W.D. Wash. 2017).

National Labor Relations Act and the Railway Labor Act—impose on private employers the duty to bargain with an exclusive representative chosen by a majority of the bargaining unit.<sup>140</sup> Statutory law, in other words, establishes the opportunity in the private sector to create a bargaining unit and mandates that employers treat it as the exclusive representative of their employees in negotiations over the terms and conditions of employment.

While the details of public and private sector labor statutes vary, the overarching structure is the same: Statutory law permits and enforces the establishment of unions capable of preempting individuals from negotiating on their own behalf with respect to conditions of employment. The justification for such regulation is, of course, that in the absence of state-sanction, the collective action problems associated with organizing a union are immense despite its aggregate benefits for all involved.

Moreover, challenges to compelled unionism in the private sector cannot take advantage of the line of First Amendment cases that acknowledge the distinct roles government plays as sovereign and proprietor.<sup>141</sup> The government, in requiring employers to respect exclusive bargaining units that meet statutory requirements, is acting as a sovereign regulator, rather than as employer. Freedom of association doctrine, with its analogous distinction between expressive and nonexpressive (including economic) associations, thus, provides the only First Amendment safe harbor.

Finally, it is worth recognizing that a reversal of *Knight* would also amount to a formal return to *Lochnerism*, and a rejection of the long recognized prerogative of legislatures to regulate the economy. Since the New Deal, that prerogative has included the right to predicate eligibility to participate in the market on any number of conditions—from the agreement to pay a fair wage or hire union members to an openness to contract with individuals regardless of race, sex, political affiliation, pregnancy status, or sexual orientation.<sup>142</sup>

---

140. See, e.g., 29 U.S.C. § 159(a) (2012); 45 U.S.C. § 152 (2012); see also *Ry. Emps.' Dep't v. Hanson*, 351 U.S. 225, 236–38 (1956) (holding that the Railway Labor Act's authorization of union shop (a.k.a. union security) agreements did not violate the First Amendment's prohibition on compelled association); but see *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 768–69 (1961) (holding that where an employee has an objection to the union, the Act must be “construed to deny the unions . . . the power to use his exacted funds to support political causes which he opposes.”); accord *Kidwell v. Transp. Comm'ns Int'l Union*, 946 F.2d 283, 291 (4th Cir. 1991) (“[U]nder the RLA, nonmember objecting employees can only be compelled to pay for activities germane to collective bargaining.”).

141. See *supra* notes 55–68 and accompanying text.

142. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) (reiterating the underlying premise that “the State is free to impose any rational regulation on the commercial transaction itself”); see also Abu El-Haj, “Live Free or Die”, *supra* note 19, at 938–39.

## CONCLUSION: DYNAMIC DIVERSITY AND BEYOND

In concluding, I would like to take a moment to reflect on how the contested constitutional status of central pillars of unionism today might inform our discussion of Professor Magarian's first book, *Managed Speech: The Roberts Court's First Amendment*.

*Managed Speech* is a welcome addition to the corpus of legal scholarship on the Roberts Court's First Amendment jurisprudence. It provides a much-needed antidote to the tendency of observers (myself included) to overemphasize the libertarian flavor of the Roberts Court's First Amendment jurisprudence. Once one broadens the scope beyond the Court's commercial and compelled speech cases, as Professor Magarian has, and reviews the entire corpus of the cases it has decided involving the First Amendment, over its first decade, the picture looks more complicated.

Professor Magarian persuasively argues that Burkean conservatism, not libertarianism, is the only way to "reconcile [the Roberts Court's] substantial First Amendment protection for expressive freedom with [its] aggressive preservation of social and political stability."<sup>143</sup> The Roberts Court's First Amendment doctrine, he argues, vindicates an idea of "managed speech."<sup>144</sup> It routinely "grant[s] wealthy and powerful actors, whether governmental or private, managerial control over public discussion; . . . disregard[s] the expressive interests of politically, socially, and economically marginal speakers; and . . . advance[es] the ultimate goal of social and political stability."<sup>145</sup> Professor Magarian proceeds to offer his own normative conception of the First Amendment, one in which the doctrine would be driven by a commitment to "dynamic diversity."<sup>146</sup>

The recent First Amendment challenges to various aspects of unionism suggest, at least, two friendly amendments to the liberal vision of the First Amendment Professor Magarian offers with his concept of dynamic diversity. The first is a call for more explicit acknowledgment that a functioning democracy requires more than boisterous discourse; it demand a plurality of organizations capable of shaping the policymaking process through protests, lobbying, getting out the vote, and appearances before administrative agencies and courts. The second, not unrelated, addendum is a caution: The First Amendment is not an end in itself, and any theory of the First Amendment must both grant and limit constitutional rights if it is

---

143. See MAGARIAN, *supra* note 16, at xv; see also *id.* at 235–37 (describing the basic contours of Burkean conservatism).

144. *Id.* at 228.

145. *Id.*

146. *Id.* at xvi–xx, 239–53.



to preserve the core commitment of all democratic systems—namely, that the vast bulk of policymaking is reserved for the political branches.

In this regard, the most underappreciated aspect of the entire recent conversation about the constitutionality of fair-share service fees is *Abood*'s virtues. *Abood* is rarely applauded for the ways in which it both preserves the balance between the various conditions for self-governance that the First Amendment protects and respects the core legislative prerogative to make decisions about the nature of our economic order.

The text of the First Amendment, as we all know, is not limited to the freedom of speech. It protects a range of prerequisites for responsive and accountable governance—including the freedom of association. In doing so, it indicates that the First Amendment is best understood as an effort to preserve a set of conditions deemed necessary for achieving a republican form of government.

Those conditions certainly include an interest in promoting a diverse marketplace of ideas—consistent with Professor Magarian's concept of dynamic diversity. But the Amendment seeks further to preserve conditions necessary for effective political organization and participation—an interest that cannot be reduced to the interest in promoting a marketplace of ideas. This second interest goes beyond a preference for encouraging a diversity of participants in public discourse. Effective political participation requires the capacity to act collectively—hence the Amendment's explicit protection for freedom of peaceable assembly and the associated freedom of association.

In this regard, it is extremely unfortunate that the Supreme Court routinely elides the distinct strands of the First Amendment. Too often, First Amendment precedent fails to articulate, let alone vindicate, the distinct conditions of self-governance that the freedom of speech and freedom of association protect.<sup>147</sup>

But that is not true of *Abood*—or *Knight*. *Abood* and *Knight* illustrate how a properly calibrated First Amendment doctrine would attend to preserving the balance between these various conditions: Individuals' free speech rights would not be so great as to undermine the co-equal rights

---

147. Abu El-Haj, *Friends, Associates, and Associations*, *supra* note 21, at 54–68 (arguing, *inter alia*, that the First Amendment's emphasis on democratic discourse eclipses the importance of political participation as conduct); Robert F. Bauer, *The Right to "Do Politics" and not Just To Speak: Thinking About the Constitutional Protections for Political Action*, 9 DUKE J. CONST. L. & PUB. POL'Y 67, 69 (2013) (criticizing the Supreme Court's campaign finance doctrine for failing to appreciate an interest in "doing politics" separate and apart from an interest in political speech where "doing politics" is defined as "the business of building coalitions and acting in concert with allies and others to achieve common political goals").

secured by the text of the First Amendment, either directly or indirectly.<sup>148</sup> Moreover, *Abood* does so while refraining from unnecessarily constitutionalizing a labor regime that may well erode one of the essential prerequisites of representative government protected by the First Amendment: a pluralist civil society comprised of organizations capable of fostering informed political participation.

This, then, points to my first friendly amendment to Professor Magarian's call for dynamic diversity: The pluralist chorus that is critically necessary to a functioning democracy is not merely a medley of voices; it is a chorus of organizations capable of flexing political muscle in the policymaking process. My key point is that the First Amendment protects more than the marketplace of ideas. It protects a marketplace of civic associations. Achieving representative government, especially with respect to policy outputs, depends on citizens being informed, organized, and politically active, and civic associations play a critical role on all three fronts.

The centrality of a pluralist civil society, comprised of associations capable of fostering informed participation, to achieving democratic accountability cannot be overstated, especially in this time of our democratic dystopia. While the public is preoccupied with *Citizens United* and the flood of money they believe it has unleashed into electoral politics, many political scientists argue, quite persuasively, that the solicitude of government officials to the preferences of wealthy citizens and donors results from deeper and longer standing trends, including the increasing organizational advantage of socioeconomic elites compared to the middle class. Affluent Americans today are estimated to be three times more likely to belong to civic organizations than middle-class Americans. Three times more likely, that is, to belong to organizations like the Chamber of Commerce or the National Right to Work Foundation, both of which have been a key sponsors of right-to-work legislation.

Lost in the acrimonious debate about the merits of public-sector unionism, in other words, is an appreciation of the fact that unions remain the secular backbone of the civic and political life of many ordinary Americans. By promoting political participation among ordinary Americans, unions, like churches, the PTA, and the Rotary Club, are part of a virtuous circle of civic mindedness, political engagement, and democratic

---

148. For a full elaboration of this position see Abu El-Haj, "*Live Free or Die*", *supra* note 19, at 921 (arguing that to the degree that "[t]he First Amendment cordons off certain spaces for individual and collective liberty in order to preserve the possibility that democratic majorities will be able to hold elected bodies accountable to the public interest," it is critical that individual free speech rights are not granted in ways that "undermine the capacity of legislatures to serve their most basic function—reaching provisional decisions, after deliberation, on contested values"—"the end for which a right is established must define its limits").

responsiveness—one that the First Amendment was established to protect not undermine.

The history of American unionism illustrates this point well. The unions that dominated civil society in the middle of the twentieth century, provided members with skills and useful political knowledge. They also canvassed households, launched voter registration drives, and mobilized communities, thereby successfully drawing ordinary Americans further into political life, including on Election Day. Even today, union households turn out on election days at much higher rates than nonunion households.

This leads me to my second amendment to Professor Magarian's conception of dynamic diversity—one which again, I view, as friendly. The union cases provide a much needed reminder that the First Amendment is not an end in itself. Rather, it secures the particular rights identified in order to vindicate a central premise of all liberal democracies: Where the measure of the good is uncertain and contested, policy debates can only be legitimately resolved on a provisional basis by the legislature.

First Amendment rights—unlike many others in our Constitution—do not function to preclude certain subjects from democratic deliberation. Instead, they serve to facilitate “the capacity of legislatures to serve their most basic function—reaching provisional decisions, after deliberation, on contested values.”<sup>149</sup> Both the freedom of speech and the freedom of association, that is, serve to “ensur[e] that the political process by which those legislative judgments are made is an open one.”<sup>150</sup>

To conclude, for me (but possibly not for Professor Magarian), *Abood* and *Knight* are unsung First Amendment heroes because they leave the ideological fights over unionism to the political process—where they belong. Each, thereby, vindicates the final end of the Amendment: preserving the capacity of legislatures to serve their primary function. Together, they illustrate how an approach to the First Amendment in which the freedom of association is not subsumed by the freedom of speech is an important antidote to both the Roberts Court's libertarian and managerial tendencies—an antidote which can restore a muscular vision of democracy at the center of the First Amendment.

Unionism may or may not be a good idea. Unions as civic associations may or may not be able to sustain their memberships. It is one thing, however, for market forces to undermine the associational life of ordinary Americans. But if unions fail to sustain themselves in the marketplace of civic associations, it should not be the product of the Court's sloppy application of freedom of association doctrine or a misguided compelled

---

149. See *id.* at 921.

150. *Id.*

speech doctrine. The First Amendment certainly shields individuals from compelled speech and association, but it, equally certainly, precludes the Court from affirmatively undermining existing civic associations and foreclosing democratic contestation.